FILE COPY

Supreme Court,
FILE
JUN 14 1
MICHAEL RODAK, J

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1542

JAMES BROWN HARDY, Acting Warden of the Maryland State Penitentiary,

Petitioner,

—v.—

MILAN M. VUITCH, M.D.,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION

ROY LUCAS
Watergate South, Suite 1501
700 New Hampshire Avenue, N.W.
Washington, D.C. 20037
Attorney for Respondent

INDEX

PAGE

Citation to Opinion Below 1

Questions Presented 2

Statement of the Case 2

Reasons for Denying the Writ 4

I. The U.S. Court of Appeals correctly applied *Roe* v. *Wade* and *Doe* v. *Bolton* retroactively in this federal habeas corpus proceeding where conduct previously classified as criminal was held to be a matter of constitutional right and no legitimate state interest would be served by a ruling of nonretroactivity 4

II. The U.S. Court of Appeals and District Court correctly held that Respondent fully exhausted state remedies before seeking a writ of federal habeas corpus by attempting three times at trial and three times on direct appeal to adjudicate his claims that the Maryland Therapeutic Abortion Act was unconstitutional 10

III. The U.S. Court of Appeals and District Court correctly held that Abstention was inappropriate where no state law questions were involved and no relief was sought against a pending state court prosecution 18

Conclusions 20

PAGE

APPENDIX:

Petition for Certiorari to the Court of Special Appeals of Maryland 1a

State v. Vuitch, Crim. No. 10328 (Md. Cir. Ct., Montgom. Cnty. Apr. 5, 1973) (Moorman, J.) 7a

State v. Vuitch, Crim. Nos. 2390, 2391 (Md. Cir. Ct., Wash. Cnty. Apr. 5, 1973) (Rutledge, J.) 8a

TABLE OF AUTHORITIES

Cases:

Brown v. Allen, 344 U.S. 443 (1953) 11, 16

Darr v. Burford, 339 U.S. 200 (1950) 15
Desist v. United States, 394 U.S. 244 (1969) 7
Doe v. Bolton, 410 U.S. 179 (1973) ..... *passim*

Eskridge v. Washington, 357 U.S. 214 (1958) (per curiam) 9

Fay v. Noia, 372 U.S. 391 (1963) 11, 19
Furman v. Georgia, 408 U.S. 238 (1972) 8

Gideon v. Wainwright, 372 U.S. 335 (1963) 9
Griswold v. Connecticut, 381 U.S. 479 (1965) 12

Hardy v. Vuitch, 473 F.2d 1370 (4th Cir. 1973) (per curiam) 1, 3, 9
Harling v. Dep't of Health & Social Services, 323 F. Supp. 899 (E.D. Wis. 1971) 9
Hawker v. New York, 170 U.S. 189 (1898) 6

Ivan v. New York, 407 U.S. 203 (1972) 9

PAGE

Katz v. United States, 389 U.S. 347 (1967) 7
Kuhn v. Fairmont Coal, 215 U.S. 349 (1910) 6

Linkletter v. Walker, 381 U.S. 618 (1965) 8

Mapp v. Ohio, 367 U.S. 643 (1961) 8
Mitchum v. Foster, 407 U.S. 225 (1972) 19

Norton v. Shelby County, 118 U.S. 425 (1886) 6, 8

Picard v. Connor, 404 U.S. 270 (1971) 11, 15, 16

Reck v. Pate, 367 U.S. 433 (1961) 9
Robinson v. Neil, 410 U.S. —— (1973) 8
Roe v. Wade, 410 U.S. 113 (1973) ..... *passim*

Siebold, Ex parte, 100 U.S. 371 (1880) 7
State v. Ingel, C.A. 14786 (Md. Cir. Ct., Prince George's Cnty. Apr. 12, 1973) 9
State v. Vuitch, Crim. No. 10328 (Md. Cir. Ct., Montgom. Cnty. Apr. 5, 1973) 18
State v. Vuitch, Crim. Nos. 2390, 2391 (Md. Cir. Ct., Wash. Cnty. Apr. 5, 1973) 18

Union Pac. R. Co. v. Botsford, 141 U.S. 250 (1891) 6
United States ex rel. Williams v. Zelker, 445 F.2d 451 (2d Cir. 1971) 9, 16

Vuitch v. State, 10 Md. App. 389, 271 A.2d 371 (Ct. Spec. App. 1970), cert. denied, 261 Md. 729, cert. denied, 404 U.S. 868 (1971) 12, 13, 17
Vuitch v. Hardy, Civ. No. 71-1129-Y (D. Md. June 22, 1972), aff'd per curiam, 473 F.2d 1370 (4th Cir. 1973) 3

PAGE

Walker v. Georgia, 409 U.S. —— (1972) 8
Waller v. Florida, 397 U.S. 387 (1970) 8
Wilwording v. Swenson, 404 U.S. 249 (1971) 11, 16
Winship, In re, 397 U.S. 358 (1970) 9

Younger v. Harris, 401 U.S. 37 (1971) 18
YWCA v. Kugler, 342 F. Supp. 1048 (D.N.J. 1972) 9

Federal Statute:

28 U.S.C. §2241 (1964) 11

State Statutes:

Ga. Crim. Code §26-1202 5
Md. Code Ann. art. 27, §645A(c) 17
Md. Code Ann. art. 43, §137 ..... 3, 5

Rules:

Maryland Rules
725(b) 13, 17
755 11
1071 ..... 13, 15

Other Authorities:

Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1040 (1970) 11
Israel & Mazer, Safety and Advantage of Office Curettage, 36 Am. J. Obstetrics & Gynecology 445 (1938) .. 10
Kelly, Non-Hospital Uterine Curettage, 9 Am. J. Obstetrics & Gynecology 78 (1925) 10
Measures, Policies and Programmes Affecting Fertility, With Particular Reference to National Family Planning Programmes 101 (U.N. 1972) 10
Model Penal Code §230.3 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1542

JAMES BROWN HARDY, Acting Warden of the Maryland State Penitentiary,

Petitioner,

—v.—

MILAN M. VUITCH, M.D.,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION

Respondent, Milan M. Vuitch, M.D., respectfully submits this brief in opposition to the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, upon the grounds that the questions presented are rendered insubstantial by the decisions of this Court in *Roe* v. *Wade*, 410 U.S. 113 (1973), and *Doe* v. *Bolton*, 410 U.S. 179 (1973), which should be held fully retrospective.

Citation to Opinion Below

The decision below has now been officially reported as *Hardy* v. *Vuitch*, 473 F.2d 1370 (4th Cir. 1973) (per curiam).

Questions Presented

I.

Whether the U.S. Court of Appeals correctly applied *Roe* v. *Wade* and *Doe* v. *Bolton* retroactively in this federal habeas corpus proceeding where conduct previously classified as criminal was held to be a matter of constitutional right and no legitimate state interest would be served by a ruling of nonretroactivity?

II.

Whether the U.S. Court of Appeals and District Court correctly held that Respondent fully exhausted state remedies before seeking a writ of federal habeas corpus by attempting three times at trial and three times on direct appeal to adjudicate his claims that the Maryland Therapeutic Abortion Act was unconstitutional?

III.

Whether the U.S. Court of Appeals and District Court correctly held that Abstention was inappropriate where no state law questions were involved and no relief was sought against a pending state court prosecution?

Statement of the Case

Dr. Milan M. Vuitch is duly licensed to practice medicine and surgery in the States of Maryland and New York, and the District of Columbia. He practices in the District where he is Medical Director of Laurel Clinic, Inc., and President of Laurel Hospital, Inc. Dr. Vuitch is a member of the

District of Columbia Medical Society and American Medical Association. He resides in Silver Spring, Maryland, with his wife and three sons. His medical training and extensive surgical experience are detailed in the Record.

In July, 1969, Dr. Vuitch was tried on the charge of having violated Md. Code Ann., art. 43, §139, by performing a therapeutic abortion in a location which was not a general community hospital licensed by the State and accredited by the private, out-of-state agency known as the Joint Commission on Accreditation of Hospitals.[1] There was no charge, nor any basis for charging, that Dr. Vuitch had other than excellent surgical qualifications, or that his medical facility was not well-equipped. There was no allegation nor evidence of malpractice, nor any other suggestion of impropriety. There was no evidence that the alleged patient could have secured a therapeutic abortion within her means and without substantial delay at a hospital. Neither the alleged patient nor her companion was charged with an offense. No Maryland law requires that any other medical procedure, regardless of complexity, be performed in a given type of clinical or hospital facility.

The trial led to a conviction, which was sustained throughout the Maryland appellate process, after which Dr. Vuitch sought and obtained a federal writ of habeas corpus upon the ground that the convicting statute was unconstitutional. *Vuitch* v. *Hardy*, Civ. No. 71-1129-Y (D. Md. June 1972) (unreported). The Fourth Circuit, relying on *Roe* v. *Wade*, 410 U.S. 113 (1973), and *Doe* v. *Bolton*, 410 U.S. 179 (1973), affirmed per curiam, 473 F.2d 1370 (4th Cir. 1973).

[1] These restrictions were categorically invalidated in *Doe* v. *Bolton*, 410 U.S. 179 (1973).

The Petition for Certiorari omits the fact that the State trial court (Circuit Court for Montgomery County) expressly considered and rejected Dr. Vuitch's federal constitutional claims. As shall appear there has also been every opportunity for the State appellate courts to rule upon the merits.

Reasons for Denying the Writ

Each of the three questions raised by the petition for writ of certiorari is so plainly insubstantial as not to justify review by this Court. *Roe* v. *Wade* and *Doe* v. *Bolton* should be held fully retroactive. Respondent fully exhausted state court remedies before seeking federal habeas corpus. The doctrine of abstention is not applicable to a federal habeas corpus case such as this.

I.

The U.S. Court of Appeals correctly applied *Roe* v. *Wade* and *Doe* v. *Bolton* retroactively in this federal habeas corpus proceeding where conduct previously classified as criminal was held to be a matter of constitutional right and no legitimate state interest would be served by a ruling of nonretroactivity.

The Petition for Certiorari does not seem to question the inevitable applicability of *Roe* v. *Wade*, 410 U.S. 113 (1973), and *Doe* v. *Bolton*, 410 U.S. 179 (1973), to the underlying merits.

The statutory provision at issue in Maryland is substantially the same as that invalidated in the Georgia case of *Doe* v. *Bolton, supra.* Compared side-by-side the two statutes read in pertinent part as follows:

Maryland	*Georgia*
[Abortion is unlawful unless performed]	
. . . in a hospital accredited by the joint commission for accreditation of hospitals and licensed by the State Board of Health and Mental Hygiene. . . . [Md. Code Ann. art. 43, §137]	. . . in a hospital licensed by the State Board of Health and accredited by the Joint Commission on Accreditation of Hospitals. [Ga. Crim. Code §26-1202 (b) (4), cited in *Doe* v. *Bolton, supra*, 410 U.S. at ——].

As can be readily seen, these provisions are virtually identical, both having been derived from the Model Penal Code §230.3. Indeed, this Court explicitly categorized the Maryland abortion law as a "form of the ALI statute." *Roe* v. *Wade, supra*, 410 U.S. at —— n. 37; *Doe* v. *Bolton, supra*, 410 U.S. at —— n. 3, —— n. 15.

However, the Petition correctly observes that retrospective application of *Roe* and *Doe* was not there at issue. Both cases are silent on the point, and it is squarely presented here. Hundreds of physicians with previously "final" abortion convictions and/or delicensures, therefore, could be affected by a disposition of this appeal on the merits.

Nonetheless, the judgment below, necessarily holding *Roe* and *Doe* fully retroactive, is so clearly correct as not to require briefing or argument. On grounds that *Roe* and *Doe* hold certain conduct in the practice of medicine to have been a matter of constitutional right *ab initio*, the decision of the lower courts could properly be affirmed per curiam.

The rules of *Roe* and *Doe* do not even enunciate novel constitutional doctrine, but simply apply settled constitutional principles dating back to the very origins of the Bill of Rights and Fourteenth Amendment. No prior case[2] had decided the constitutional questions presented in *Roe* or *Doe*. However, as stated in *Roe:*

> in a line of decisions . . . going back perhaps as far as *Union Pacific R. Co.* v. *Botsford,* 141 U.S. 250 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution [*Roe* v. *Wade, supra,* 410 U.S. at ——].

On this view of *Roe* and *Doe* the cases obviously are fully retroactive in application if, indeed, "retroactivity" is even an issue.

Viewing the case as one in which principles of retroactivity are determinative, the judgment below is also correct. As Mr. Justice Holmes declared in *Kuhn* v. *Fairmont Coal Co.*,[3] "[j]udicial decisions have had retrospective operation for near a thousand years." Holmes' 1910 dissent drew from the classic statement in *Norton* v. *Shelby County*[4] that

---

[2] The first case remotely related to abortion was *Hawker* v. *New York,* 170 U.S. 189 (1898), which upheld retroactive delicensure of a physician who had been convicted of illegal abortion prior to passage of the licensing statute. *Roe* necessarily overrules *Hawker,* although the latter was never brought to the Court's attention in any of the briefs.

[3] 215 U.S. 349, 372 (1910) (dissenting opinion).

[4] 118 U.S. 425, 442 (1886).

> [a]n unconstitutional act is not a law; it confers no right; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.

Mr. Justice Harlan, dissenting from a decision of nonretroactivity in *Desist* v. *United States*,[5] pointed out that federal habeas corpus relief had always been allowed "when the habeas petitioner attacked the constitutionality of the state statute under which he had been convicted . . . since . . . the State had no power to proscribe the conduct for which the petitioner was imprisoned."[6] Reliance was placed on *Ex parte Siebold*,[7] where Mr. Justice Bradley stated:

> An unconstitutional law is void, and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void and cannot be a legal cause of imprisonment. . . . [T]he judgment may be final, in the sense that there may be no means of reversing it. But . . . the question of the court's authority to try and imprison the party may be reviewed on habeas corpus. . . . [I]f the laws are unconstitutional and void, the circuit court acquired no jurisdiction. . . .[8]

---

[5] 394 U.S. 244 (1969). *Desist* declined to apply *Katz* v. *United States*, 389 U.S. 347 (1967), to invalidate introducton before December 18, 1967, of evidence from nonpenetrative electronic surveillance.

[6] 394 U.S. at 261 n. 2.

[7] 100 U.S. 371 (1880). *Siebold* held that the Supreme Court had plenary appellate habeas corpus jurisdiction to review the judgment of a lower United States court wherein appellants contested an Act of Congress as unconstitutional.

[8] 100 U.S. at 376-77.

While the Court since *Linkletter* v. *Walker*[9] has receded from any absolute rule of retrospective operation, the present case is of the classic variety which justifies application of that rule.

Here, as in *Robinson* v. *Neil*,[10] the Court is asked by Respondent to apply the decisions of *Roe* and *Doe* "to prevent a trial from taking place at all, rather than to prescribe procedural rules which govern the conduct of a trial." Far more than "the very integrity of the fact-finding process"[11] is at stake. This Court has held in *Roe* and *Doe* that the alleged conduct of Dr. Vuitch is no crime at all. To set an arbitrary point in time at which the medical practice of abortion went from constitutionally privileged to criminal would serve none of the objectives underlying *Linkletter* and similar decisions. Particularly is this the case since Dr. Vuitch sought direct review by certiorari in this Court, which was denied, 404 U.S. 868, making his state conviction final. Had certiorari been granted and the case decided with *Doe* v. *Bolton*, *supra*, there would have been no need for post conviction proceedings and a decision on the retroactivity point.

Rather, the Court should apply decisions in line with *Norton* v. *Shelby County*, and *Robinson* v. *Neil*, *supra*. Examples are numerous.

The holding in *Walker* v. *Georgia*, 409 U.S. —— (1972), that the death penalty case, *Furman* v. *Georgia*, 408 U.S.

---

[9] 381 U.S. 618 (1965), giving prospective application only to *Mapp* v. *Ohio*, 367 U.S. 643 (1961).

[10] 410 U.S. ——, —— (1973). *Robinson* applied *Waller* v. *Florida*, 397 U.S. 387 (1970), retroactively, for a unanimous Court.

[11] *Linkletter*, *supra*, 381 U.S. at 639.

238 (1972), is retroactive applies *a fortiori* here where not only the sentence but punishment of the conduct was constitutionally impermissible. *Gideon* v. *Wainwright,* 372 U.S. 335 (1963), itself a federal habeas corpus case, applied the right to counsel retroactively. More important than any procedural right, however, is the right not to be punished at all for conduct which is protected by the Constitution. Of similar import are *Eskridge* v. *Washington,* 357 U.S. 214 (1958) (per curiam), and *Reck* v. *Pate,* 367 U.S. 433 (1961), overturning, respectively, *1935* and *1936* convictions based on retroactive application of "new" constitutional rules.[12] Dr. Vuitch's *1969* conviction for conduct now held to have been privileged deserves similar treatment. In fact, four federal and one State court decision already hold by necessary implication that *Roe* and *Doe* are fully retroactive.[13] No decisions to the contrary have been found.

Finally, the State contends that evidence on the safety of therapeutic abortion was unavailable in 1968. This overlooks the earlier publication of numerous relevant studies in medical journals available at Maryland hospitals and libraries.[14] This evidence, referred to as "data of good

---

[12] *See also Ivan* v. *New York,* 407 U.S. 203 (1972), holding *In re Winship,* 397 U.S. 358 (1970), retroactive; *Berger* v. *California,* 393 U.S. 314 (1969), holding *Barber* v. *Page,* 390 U.S. 719 (1968), retroactive; *Roberts* v. *Russell,* 392 U.S. 293 (1968), holding *Bruton* v. *United States,* 391 U.S. 123 (1968), retroactive.

[13] *Hardy* v. *Vuitch,* 473 F.2d 1370 (4th Cir. 1973); *United States ex rel. Williams* v. *Zelker,* 445 F.2d 451 (2d Cir. 1971); *YWCA* v. *Kugler,* 342 F. Supp. 1048 (D.N.J. 1972); *Harling* v. *Dep't of Health & Social Services,* 323 F. Supp. 899 (E.D. Wis. 1971); *State* v. *Ingel,* C.A. 14786 (Md. Cir. Ct., Prince George's County Apr. 12, 1973) (Couch, J.).

[14] Among the studies cited in Dr. Vuitch's evidence are Hubinot, *Abortion in Western and Southern Europe: A Preliminary Study*

quality" by the *United Nations Fertility Report*,[15] was primarily drawn from the years 1957-67, and was collected in a table which was part of Dr. Vuitch's evidence before the District Court.

It was also before this Court in *Roe* v. *Wade*, and *Doe* v. *Bolton, supra.*

As is evident, good quality data has long been available. Indeed, the earliest suggestions that abortion procedures be performed on an outpatient basis in a clinic or office can be traced back to 1925 and a paper by the famed Howard A. Kelly, M.D., of Johns Hopkins, on non-hospital uterine curettage, 9 Am. J. Obstetrics & Gynecology 78 (1925). *See also* Israel & Mazer, *Safety and Advantage of Office Curettage*, 36 Am. J. Obstetrics & Gynecology 445 (1938).

II.

The U.S. Court of Appeals and District Court correctly held that Respondent fully exhausted state remedies before seeking a writ of federal habeas corpus by attempting three times at trial and three times on direct appeal to adjudicate his claims that the Maryland Therapeutic Abortion Act was unconstitutional.

Dr. Vuitch asserted defects in the convicting statutory provision under the Due Process and Equal Protection Clauses of the Federal Constitution. These defects unjusti-

---

(Intnl. Conf. on Abortion, Hot Springs, Va., 1968); Potts, *Legal Abortion in Eastern Europe*, 59 Eugenics Review 232 (1967); and Tietze & Lehfeldt, *Legal Abortion in Eastern Europe*, 175 J. Am. Med. Ass'n 1149 (Apr. 1961).

[15] *Measures, Policies and Programmes Affecting Fertility, With Particular Reference to National Family Planning Programmes* 101 (U.N. 1972).

fiably abridge federally protected rights. Jurisdiction over this action for habeas corpus therefore rests upon the express provisions of the Federal Habeas Corpus Statute, 28 U.S.C. §2241 (1964), subject to the exhaustion requirement and related doctrines. See *Wilwording* v. *Swenson*, 404 U.S. 249 (1971) (per curiam); *Fay* v. *Noia*, 372 U.S. 391 (1963); *Brown* v. *Allen*, 344 U.S. 443 (1953); see generally *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1040 (1970).

Both the District Court and the U.S. Court of Appeals summarily rejected the State's claim on exhaustion of remedies. In concluding that "the state courts have had ample opportunity to investigate and consider petitioner's contentions" (Petition for Certiorari, at 3a), the District Court correctly applied the controlling legal standard to the facts of this case. This Court recently described the policy and scope of the exhaustion doctrine as "an accommodation of our federal system designed to give the State the initial 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights." *Wilwording* v. *Swenson, supra*, 404 U.S. at 250. In another recent case the Court stated that "once the federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied." *Picard* v. *Connor*, 404 U.S. 270, 275 (1971).

1. *The Montgomery County Circuit Court had three opportunities to resolve and did in fact decide the federal questions presented here.* Dr. Vuitch's trial was held in early July 1969. At trial, Dr. Vuitch, through his counsel, filed a written motion for judgment of acquittal pursuant to Rule 755 of the Maryland Rules of Procedure. This motion was based in part on his contention that the statute under which he was charged

> is unnecessarily broad and invades the area of protected freedoms of both the pregnant woman and the Defendant * * * is without compelling State interest sufficient to justify this encroachment upon personal liberty, and, consequently * * * is invalid and unconstitutional under the due process and equal protection clauses of the Fourteenth Amendment. . . . [quoted in *Vuitch* v. *State*, 10 Md. App. 389, 394, 271 A.2d 371, 374 (Ct. Spec. App. 1970)].

The Circuit Court denied Dr. Vuitch's Motion for Judgment of Acquittal without comment, again denied the motion when it was renewed orally at the end of the trial, and for the third time rejected his contentions, as follows, when denying a motion for a new trial:[16]

> The second contention of the Defendant is that the statute under which Defendant is charged is unconstitutional as being a denial of equal protection of the laws in accordance with the *Griswold* case (*Griswold* v. *Connecticut*, 381 U.S. 479). The Court does not see that the instant case is comparable factually to *Griswold* and finds no denial here as charged [quoted in *Vuitch* v. *State*, 10 Md. App. 389, 271 A.2d 371, 378 n. 6 (Ct. Spec. App. 1970)].

2. *The Court of Special Appeals of Maryland had two opportunities to decide the federal questions.* On direct appeal to the Maryland Court of Special Appeals, Dr. Vuitch reasserted his constitutional challenge to the statute, and his claim was fully briefed and argued by both sides.

---

[16] The Petition for Certiorari neglects to mention this ruling quoted in the text.

as well as by *Amici Curiae,* but the Court refused to decide it. Affirming the conviction, the Court ruled that the "constitutional issues * * * were not properly preserved for appellate review." *Vuitch* v. *State,* 10 Md. App. at 397, 271 A.2d at 376. The Court's ruling was grounded upon its conclusion that:

> The motion for judgment of acquittal is not an appropriate vehicle to challenge the constitutionality, facial or otherwise, of the statute under which the criminal prosecution is initiated [10 Md. App. at 397, 271 A.2d at 376].

According to the Court, Dr. Vuitch had waived his right to question the statute under which he was convicted, by reason of his failure to assert his constitutional challenges by a pre-trial motion pursuant to Maryland Rule 725(b), which provides in pertinent part:

> Defenses and objections based on defects in the institution of the prosecution or in the indictment, other than that it fails to show jurisdiction in the court or to charge an offense, must be raised by motion before trial.

Next, in a timely *Motion for Reargument and Stay of Mandate,* filed December 18, 1970, Dr. Vuitch urged that the case be reargued or remanded, pursuant to Maryland Rule 1071,[17] for full adjudication of the substantial constitutional issues involved herein. This motion was based, *inter alia,* on the fact that, since the procedural rule enforced by

[17] The State also neglects to mention this important Maryland procedural device in its review of the proceedings before the Court of Special Appeals.

the Court was unclear at best, it was unfair to hold that Dr. Vuitch had forever forfeited his right to an adjudication of the constitutionality of the convicting statute. Accordingly, he sought a remand for the full presentation and development of his challenge on constitutional grounds to the Maryland abortion statute. In opposition, the Attorney General argued that "there must be an end to litigation." The Court denied Dr. Vuitch's motion on January 22, 1971, without opinion. Thus the Court of Special Appeals had avoided two opportunities to decide the federal questions.

3. *The Court of Appeals of Maryland declined two opportunities to decide the federal questions.* After Dr. Vuitch petitioned the Court of Special Appeals of Maryland for reargument and remand, he attempted to secure further state court relief by petitioning the Court of Appeals of Maryland for a writ of certiorari (Appendix A hereto). This petition offered the highest court of Maryland, in effect, two opportunities for a review of the federal constitutional questions presented here. First, the Court could have directly reviewed the merits, as the trial court had done. Second, the Court of Appeals could have ordered the Court of Special Appeals to order a remand if more evidence were deemed necessary. Instead, the Court of Appeals denied certiorari, 261 Md. 729, as did this Court. 404 U.S. 868 (1971).

4. *Dr. Vuitch had no obligation to seek state post-conviction relief.* The State's contention that Dr. Vuitch has not exhausted state court remedies, wholly without merit, was thoroughly dealt with by the District Court and rejected out of hand by the U.S. Court of Appeals for the Fourth Circuit. The courts below correctly and compre-

hensively decided this question, and the State's contentions on this issue should be summarily rejected by this Court. Four times the Maryland appellate courts "had a fair opportunity to consider the [claimed denial of rights] and to correct [the] asserted constitutional defect * * *." *Picard* v. *Connor, supra,* 404 U.S. at 276. Although the merits were argued before the Maryland Court of Special Appeals, they were avoided on hyper-technical procedural grounds. The State's suggestion that the record was inadequate at that time ignores the facts that questions of constitutional law were at issue; that relevant medical facts could be judicially noticed and were presented to the Court of Special Appeals; and that Dr. Vuitch asked for a Maryland Rule 1071 remand, expressly permitted by the rule, to the trial court to develop the record further if the Court so desired. The remand request was summarily denied. At every level of the state judiciary, the State opposed a decision on the merits of Dr. Vuitch's constitutional claims. Indeed the State took the position that these claims had been *waived*. At every level, however, Dr. Vuitch presented the state courts with more than one opportunity to resolve the constitutional issues.

Nothing more could reasonably be required of Dr. Vuitch to satisfy the exhaustion requirement. He has on several occasions provided "an opportunity to the State courts to correct a constitutional violation * * *." *Darr* v. *Burford,* 339 U.S. 200, 204 (1950). Indeed, he has provided a far greater opportunity for a decision on the merits than is found in many decisions upholding federal habeas jurisdiction, including one case on an abortion law where Mr. Justice Tom C. Clark, sitting on the Second Circuit, found sufficient exhaustion by a physician petitioner who had

raised no federal constitutional questions at the trial level, but had raised them *pro se* on appeal, where they were summarily rejected. *United States ex rel. Williams* v. *Zelker*, 445 F.2d 451, 454 (2d Cir. 1971) (Clark, J.). See also *Roberts* v. *LaVallee*, 389 U.S. 40 (1967); *Brown* v. *Allen*, 344 U.S. 443 (1953). Comparable exhaustion questions have more recently been routinely set for summary disposition by the Court, as in *Wilwording* v. *Swenson*, 404 U.S. 249 (1971) (per curiam).

If a claim has been fairly presented to State courts at trial and on direct appeal, there is no additional requirement to pursue state collateral remedies before seeking federal relief. E.g., *Brown* v. *Allen*, *supra*; *United States ex rel. Williams* v. *Zelker*, *supra*. Therefore, Dr. Vuitch's failure to seek relief under Maryland's Post-Conviction Procedure Act does not bar a ruling that state remedies had been exhausted within the meaning of the law.

Cases cited by the Attorney General are inapposite. In *Picard* v. *Connor*, *supra*, for instance, where this Court ruled that state remedies had not been exhausted, the constitutional issue involved—whether the indictment procedure violated Fourteenth Amendment rights—had never even been raised in the state courts. After examining "the pretrial, trial, and appellate papers," the Court did not "discover any indication of an attack" on the indictment on equal protection grounds. 404 U.S. at 274. The Court concluded that "it is not sufficient that the federal habeas applicant has been through the state courts"; he must have presented "the state courts with the same claim he urges upon the federal courts," *id.* at 275-276.

In contrast to the petitioner in *Picard* v. *Connor*, Dr. Vuitch sought from the beginning to adjudicate his consti-

tutional claims in state court. These claims were raised and decided three times at trial, and were asserted three times on direct appeal. Dr. Vuitch clearly gave the state courts the requisite "initial opportunity" to decide his claims.

Even if Post-Conviction Procedure Act ("PCPA") relief were technically still available, that is not sufficient because *in fact* no reasonable probability of state court adjudication remained for Dr. Vuitch.

Maryland courts have already ruled on direct appeal that, by failing to file a pre-trial motion, Dr. Vuitch *waived* his right to question the constitutionality of the statute. Ruling that the constitutional issues were not preserved for appellate review, the Court of Special Appeals reasoned that a challenge to the constitutionality of a criminal statute was a "defense or objection which may be *waived* unless presented by motion before trial."[18] 10 Md. App. at 398, 271 A.2d at 377 (emphasis added).

This finding of waiver would have been repeated in any state court collateral proceeding. Maryland's PCPA creates a presumption that a petitioner has waived any allegation of error not made at the time required by state rules of procedure. Md. Code Ann., art. 27, §645A(c). Since the Maryland Court of Special Appeals had ruled that Dr.

[18] The Attorney General had argued that federal constitutional challenges to state criminal statutes were waived unless raised by pretrial motion:

> The challenge to the constitutionality does not * * * go to the court's jurisdiction and under Rule 725b *the objection was waived by not being timely raised* * * *. Appellant's objection could, and should, have been raised by motion before trial, and was therefore *waived*. [*Brief of Appellee*, at 7-8, *Vuitch* v. *State*, 10 Md. App. 389, 271 A.2d 371 (Ct. Spec. App. 1970) (emphasis added).]

Vuitch's claim that the statute was unconstitutional was required to be made by a pre-trial motion, this claim was "waived" within the meaning of the Post-Conviction Procedure Act.

III.

The U.S. Court of Appeals and District Court correctly held that Abstention was inappropriate where no state law questions were involved and no relief was sought against a pending state court prosecution.

Relying upon *Younger* v. *Harris,* 401 U.S. 37 (1971) and its companion cases, the State argues that the District Court should have abstained because the constitutional issues herein had been raised by Dr. Vuitch in other criminal prosecutions pending in state court.[19] The State ignores the fact that the fundamental issue in this case, as in every habeas corpus case, is whether or not the petitioner's detention violates his constitutional rights. Litigation of that issue cannot wait. Defense against one criminal prosecution cannot undo the injury suffered by unconstitutional imprisonment resulting from a different prosecution.

The Attorney General's reliance upon *Younger* v. *Harris* and its companion cases is thus misplaced. In each of these cases, the question was whether a three-judge federal court could enjoin a pending criminal prosecution in State court or issue a declaratory judgment as to matters involved in the pending State case. As the Court observed in *Samuels* v. *Mackell,* 401 U.S. 66, 73 (1971):

---

[19] Both such cases were dismissed on April 5, 1972, thereby arguably mooting this claim by the State. See *State* v. *Vuitch,* I and II, Appendix, at 7a, 8a.

> [T]he practical effect of the two forms of relief will be virtually identical, and the basic policy against federal interference with pending state criminal prosecution will be frustrated as much by a declaratory judgment as it would be by an injunction.

In our case, we have no question of direct interference with a pending state court prosecution. The only question here is whether Dr. Vuitch's jail sentence was pursuant to an unconstitutional statute.

A federal habeas corpus petition by its nature raises questions that cannot be deferred.[20] As the Court has stated, "[F]ederal court jurisdiction is conferred by the allegation of unconstitutional restraint." *Fay* v. *Noia,* 372 U.S. 391, 426 (1963). No extraordinary circumstances exist which could justify postponement of a decision whether a present detention violates constitutional rights. In such a case as this one, where the convicting statute has been found to be invalid, the injury of unlawful incarceration is immediate, irreparable and extreme.

---

[20] Cf. *Mitchum* v. *Foster,* 407 U.S. 225, 237 (1972), where the Court noted that federal habeas corpus remedy was a "specific and uniquely federal right or remedy" excepted from the anti-injunction statute.

CONCLUSIONS

For the reasons set out in this Brief of Respondent in Opposition, the Court should either deny the petition for writ of certiorari or grant the petition and affirm the judgment below, holding *Roe* v. *Wade* and *Doe* v. *Bolton* fully retroactive.

Respectfully submitted,

Roy Lucas
Watergate South, Suite 1501
700 New Hampshire Avenue, N.W.
Washington, D.C. 20037
Attorney for Respondent

Dated: June , 1973.

APPENDIX

APPENDIX

IN THE

COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 1970

Docket No. .....

MILAN M. VUITCH, M.D.,

Petitioner,

—v.—

STATE OF MARYLAND,

Respondent.

Petition for Certiorari to the Court of Special Appeals of Maryland

The petitioner, Milan M. Vuitch, M.D. (hereinafter referred to as "Petitioner"), through his counsel, herewith petitions this Court for a writ of certiorari to the Court of Special Appeals for review of its judgment in the above-captioned case entered on November 24, 1970. *Vuitch* v. *State*, 10 Md. App. 389, 271 A.2d 371 (Ct. Spec. App. 1970).

I. *Jurisdictional Statement*

The opinion of the Court of Special Appeals was filed on November 24, 1970. (A copy of this opinion is attached hereto as Exhibit A.) In this opinion, the Court of Special Appeals affirmed the conviction of petitioner in the Circuit Court of Montgomery County (Shure, J.) on charges of

having performed an abortion in violation of *Md. Code Ann.*, Art. 43, §137 (Cum. Supp. 1970). Petitioner, through his counsel, filed a timely Motion for Reargument and Stay of Mandate on December 18, 1970. On January 22, 1971, this Motion was denied, and the Mandate was issued by the Court of Special Appeals.

The jurisdiction of this Court is invoked pursuant to *Md. Code Ann.*, Art. 5, §21A (Cum. Supp. 1970), and this Petition is filed in accordance with Rule 811(b) of the Maryland Rules of Procedure.

II. *Statement of the Case*

Petitioner was convicted in the Circuit Court of Montgomery County (Shure, J.) on charges of having performed an abortion at "a location which is not a hospital accredited by the joint commission for accreditation of hospitals and licensed by the State Board of Health and Mental Hygiene * * *," in violation of *Md. Code Ann.*, Art. 43, §137 (Cum. Supp. 1970). A sentence of three years' imprisonment (with two years to be suspended after one year was served) and a $5,000 fine was imposed.

During the trial, petitioner filed a written motion for judgment of acquittal pursuant to Rule 755 grounded in part on his contention that the statute under which he was charged is "invalid and unconstitutional under the due process clauses of the Fourteenth Amendment to the United States Constitution. . . ." [10 Md. App. at 394, 271 A. 2d at 374]. This motion was denied without comment by the trial judge. Subsequent to his conviction but before sentencing, petitioner moved for a new trial, again asserting his constitutional defenses. In denying this motion, the trial court did comment on the constitutional issues involved:

> The second contention of the defendant is that the Statute under which defendant is charged is unconstitutional as being a denial of equal protection of the laws in accordance with the Griswold case (*Griswold* v. *Connecticut,* 381 U.S. 479). The Court does not see that the instant case is comparable factually to Griswold and finds no denial here as charged. [*State* v. *Vuitch* (Mont. Cy. Cir. Ct., Crim. No. 9954), Ruling on Motion For New Trial, dated November 16, 1969]

On appeal to the Court of Special Appeals, petitioner reasserted his constitutional challenge to the statute. The Court declined to consider the constitutional issues, ruling that the "constitutional issues . . . were not properly preserved for appellate review." [*Vuitch* v. *State, supra,* 10 Md. App. at 397, 271 A. 2d at 376.]

The Court's ruling was grounded upon its conclusion that

> The motion for judgment of acquittal is not an appropriate vehicle to challenge the constitutionality, facial or otherwise, of the statute under which the criminal prosecution is initiated. [*Ibid.*]

According to the Court, petitioner was thus precluded from gaining review of his constitutional defenses by reason of his failure to assert his challenges by a pre-trial motion pursuant to Rule 725(b).

In his Motion for Reargument and Stay of Mandate, filed December 18, 1970, petitioner urged that the case be remanded, pursuant to Rule 1071, to the trial court for full adjudication of the substantial constitutional issues involved herein. This Motion was based in part on petitioner's contention that the procedural requirement that constitutional defenses be raised pre-trial was at best un-

clear, and that, therefore, petitioner should not forever be foreclosed from raising these defenses by his initial choice of an inappropriate vehicle.

Petitioner's Motion for Reargument was also keyed to the observation by the Court of Special Appeals that

> [I]t would be foolhardy in the extreme to undertake the resolution of such complex constitutional questions upon a record as procedurally and substantively deficient as that now before us. . . . [10 Md. App. at 397, 271 A. 2d at 376.]

Accordingly, petitioner sought remand for the full presentation and development of a constitutional defense.[1] On January 22, 1971, petitioner's Motion was denied by the Court of Special Appeals, without an opinion.

III. *Reasons for Granting the Writ*

Review of the decision by the Court of Special Appeals in this case is clearly "desirable and in the public interest." *Md. Code Ann.*, Art. 5, §21A (Cum. Supp. 1970). Despite his attempts, petitioner has not yet obtained appellate consideration of the substantial constitutional issues involved in his conviction, nor has he, upon being deemed to have chosen an inappropriate procedural vehicle, been given the opportunity to develop the factual basis considered desirable by the Court of Special Appeals for decision of the constitutional questions presented herein.

---

[1] By this Motion, petitioner did not, and does not now, abandon either his contention that the statute under which he was convicted is constitutionally defective on its face, or any other of the grounds upon which he asserts that his conviction must be reversed.

In its opinion on appeal, the Court of Special Appeals itself acknowledged the importance of prompt decision of these constitutional issues, in a manner which highlights the desirability and public importance of review by this Court:

> In concluding that the constitutional questions now sought to be raised were not properly preserved for appellate review, we do not seek to delay the day when these *important public issues* must be squarely met and decided, either by us, or the Court of Appeals of Maryland [10 Md. App. at 397, 271 A. 2d. 376 (emphasis added)].

This statement only underlines the obvious importance of a prompt resolution of the constitutional status of the Maryland abortion statute. Pending review, Maryland doctors and their patients, as well as petitioner, are being denied the benefit of an adjudication of the very substantial constitutional questions concerning the validity of the Maryland statute. Review at this time is particularly crucial since many of the basic issues involved in this case are presently before the United States Supreme Court. E.g., *United States* v. *Vuitch*, (U.S.) (No. 84, 1970 Term); *Roe* v. *Wade*, (U.S.) (No. 808, 1970 Term).

IV. *Conclusion*

Petitioner, reserving the right to file an amended, modified, supplemental or substitute Petition within, but

no later than, the period prescribed by Rule 812(a), respectfully submits that this Petition should be granted.

Respectfully submitted,

ROY LUCAS
Roy Lucas (per TJB)
Four Patchin Place
New York, New York 10011
212-691-2020

E. BARRETT PRETTYMAN, JR.
E. Barrett Prettyman, Jr. (per TJB)

TIMOTHY J. BLOOMFIELD
Timothy J. Bloomfield
815 Connecticut Avenue
Washington, D. C. 20006
202-298-5500

Counsel for Petitioner

Order

IN THE

CIRCUIT COURT

FOR MONTGOMERY COUNTY, MARYLAND

Criminal No. 10328

STATE OF MARYLAND,

—v.—

MILAN M. VUITCH, M.D.

Defendant.

Upon consideration of the motion of the defendant, Milan M. Vuitch, M.D., to dismiss charges herein and State's consent thereto, it is thereupon, this 5th day of April 1973,

ORDERED that the Motion to Dismiss Charges filed herein by information be and it is hereby granted as to the defendant Milan M. Vuitch.

WALTER H. MOORMAN
Judge of the Circuit Court for Montgomery County, Maryland

Memorandum and Order

IN THE

CIRCUIT COURT

FOR WASHINGTON COUNTY, MARYLAND

Crim. Trial Nos. 2390, 2391

STATE OF MARYLAND,

—v.—

MILAN M. VUITCH, M.D.,

Defendant.

The decisions of the Supreme Court of the United States, on January 22, 1973 in Doe v. Bolton, —— U.S. —— and Roe v. Wade, —— U.S. ——, held that Statutes of Georgia and Texas were unconstitutional. These Statutes do not differ from Art. 27, ¶3 of the Maryland Code in sufficient degree to distinguish them for purposes of a constitutional test.

Accordingly, it is by the Circuit Court for Washington County, Maryland, this 5th day of April, 1973,

ORDERED, that the defendant's Motion to Dismiss is granted and the Warrant is dismissed.

s/ RUTLEDGE
Judge.